

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling that Clark)	WT Docket No. 19-230
County, Nevada Ordinance No. 4659 Is)	
Unlawful Under Section 253 of the)	
Communications Act, as Interpreted by the)	
Federal Communications Commission, and Is)	
Preempted)	

COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION

Competitive Carriers Association (“CCA”)¹ hereby submits the following comments in response to the *Public Notice* in the above-captioned proceeding. The Wireless Telecommunications Bureau (the “Bureau”) seeks comment on Verizon’s Petition for Declaratory Ruling regarding fees charged by Clark County, Nevada for small wireless facilities installed in public rights of way.² The Bureau has recognized correctly that the Petition “raises

¹ CCA is the nation’s leading association for competitive wireless providers and stakeholders across the United States. CCA’s membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers, to regional and national providers serving millions of customers. CCA also represents associate members including vendors and suppliers that provide products and services throughout the mobile communications supply chain.

² See *Wireless Telecommunications Bureau Seeks Comment on Verizon’s Petition for Declaratory Ruling Regarding Fees Charged by Clark County, Nevada for Small Wireless Facilities*, Public Notice, DA No. 19-823, WT Docket No. 19-230 (rel. Aug. 26, 2019) (“*Public Notice*”); Verizon, Petition for Declaratory Ruling that Clark County, Nevada Ordinance No. 4659 Is Unlawful Under Section 253 of the Communications Act, as Interpreted by the Federal Communications Commission, and Is Preempted (filed Aug. 8, 2019) (“*Petition*” or “*Verizon Petition*”).

important issues that potentially affect not only Verizon but other providers operating both in and outside of Clark County.”³

The unusually high recurring fees that Clark County charges wireless carriers for small cell deployments in the rights of way represent a paradigm example of the problem that the Federal Communications Commission (“FCC” or “Commission”) intended to address in the *Small Cell Declaratory Ruling*.⁴ These fees materially inhibit the provision of telecommunications services and violate Section 253 of the Communications Act (the “Act”). The Commission therefore should preempt Clark County’s recurring fees for small wireless deployments in the rights of way.

I. THE COMMISSION ADOPTED CLEAR PREEMPTION STANDARDS IN THE SMALL CELL DECLARATORY RULING

The Commission has made great strides in reducing the barriers to deploy the infrastructure needed for next generation technologies.⁵ CCA continues to be a strong proponent of these actions, including the Commission’s decision in the *Small Cell Declaratory Ruling*. Many state and local governments have been great partners in the effort to deploy wireless

³ See *Verizon Petition for Declaratory Ruling Regarding Fees Charged by Clark County, Nevada for Small Wireless Facilities*, Order, DA No. 19-927, WT Docket No. 19-230, ¶ 1 (rel. Sept. 18, 2019) (denying Clark County’s request to suspend consideration of the Verizon Petition and postpone the pleading cycle until the conclusion of ongoing settlement discussions between the parties).

⁴ See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 (2018) (“*Small Cell Declaratory Ruling*”), *recon. pending, appeals pending*.

⁵ See, e.g., *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, 32 FCC Rcd. 9760 (2017); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, 33 FCC Rcd. 3102 (2018), *affirmed in part, vacated and remanded in part sub nom. United Keetoowah Band of Cherokee Indians in Oklahoma et al. v. Fed. Comm’n*, 933 F.3d 728 (D.C. Cir. 2019); *Small Cell Declaratory Ruling*.

telecommunications infrastructure and bridge the digital divide. However, despite the Commission's actions in the *Small Cell Declaratory Ruling*, some local governments continue not to accommodate the network deployments needed to support advanced wireless networks in their communities.

In its *Small Cell Declaratory Ruling*, the Commission correctly recognized that wireless carriers will need to significantly densify their networks to support 5G. The Commission concluded that the “fees that once may have been tolerable when providers built macro towers several miles apart now act as effective prohibitions” when multiplied by the many small facilities that carriers must deploy.⁶

The record before the Commission included specific examples of municipalities that were charging excessive and unreasonable fees unrelated to their maintenance and management of rights of ways or cost recovery,⁷ and found that such fees were impeding deployment to the detriment of consumers and 5G deployment goals.⁸ The Commission clarified that such excessive fees and charges for small wireless deployments violate Sections 253 and 332 of the Act,⁹ and that a state or local legal requirement constitutes an effective prohibition and should be

⁶ See *Small Cell Declaratory Ruling*, 33 FCC Rcd. at 9112 ¶ 48.

⁷ See *id.* at 9096 ¶ 25 (citing record evidence).

⁸ See *id.*

⁹ Sections 253 and 332 prohibit state and local government actions that “prohibit or have the effect of prohibiting” the ability to provide any telecommunications or personal wireless service. 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II). In addition, Section 253 provides that state or local governments may seek “fair and reasonable compensation” for the use of rights of ways, management of the rights of way and compensation must be “competitively neutral and nondiscriminatory”, and any required compensation must be “publicly disclosed.” 47 U.S.C. § 253(c).

preempted if it “materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment”¹⁰

In particular, the Commission concluded that fees for small wireless facility deployments violate Sections 253 or 332(c)(7) if they do not represent a reasonable approximation of the state or local government’s costs. The Commission also determined that, even when fees include objectively reasonable costs, such fees can harm competition if similarly-situated competitors face different charges.¹¹ The Commission therefore identified three factors to examine to determine if fees for small wireless facilities comply with the Act; the failure to satisfy any one of the three factors renders the fees non-compliant and subject to preemption.¹² First, the Commission will look at whether the fees reasonably approximate the actual and direct costs associated with a provider’s use of the public rights-of-way and other assets. Second, the Commission will assess whether the fees are limited to objectively reasonable costs. Finally, the Commission will consider whether the fees are inherently discriminatory.¹³ The Commission also identified specific fee levels for small wireless facility deployments that presumably comply with the relevant standard including, as applicable here, \$270 per small wireless facility per year for all recurring fees.¹⁴

¹⁰ See *Small Cell Declaratory Ruling*, 33 FCC Rcd. at 9102 ¶ 35, 9130 ¶¶ 82–83. See also *California Payphone Ass’n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park*, 12 FCC Rcd. 14191, 14206 ¶ 31 (1997) (“*California Payphone*”).

¹¹ See *Small Cell Declaratory Ruling*, 33 FCC Rcd. at 9112 ¶ 50.

¹² See *id.*

¹³ See *Public Notice*, DA No. 19-823, at 1, citing Verizon Petition at 1–2. See also *Small Cell Declaratory Ruling*.

¹⁴ See *Small Cell Declaratory Ruling*, 33 FCC Rcd. at 9129–9130 ¶¶ 78–80.

II. CLARK COUNTY’S FEES ARE A QUINTESSENTIAL EXAMPLE OF FEES THAT THE FCC SHOULD PREEMPT PURSUANT TO THE *SMALL CELL DECLARATORY RULING*

The recurring fees contained in Clark County’s ordinance represent a clear violation of the standards announced by the Commission in the *Small Cell Declaratory Ruling*.

First, the fees do not reasonably approximate the County’s actual and direct costs associated with a provider’s use of the public rights of way and other assets. Clark County has not provided any evidence of its costs, and the history of the Clark County ordinance establishing these fees suggests that the fees were never intended to be cost-based, but rather “focus[ed] on existing and potential County revenues and, in short, charging the highest amounts that . . . applicants might pay.”¹⁵

Second, Clark County’s fees are not limited to the County’s objectively reasonable costs.¹⁶ For example, Clark County charges fees based on a carrier’s gross revenues, but has not justified how a carrier’s gross revenues relate to the County’s reasonable costs. In addition, the fee for a wireless facility installation is the same regardless of whether the facility is installed on a County-owned structure or a third-party structure, even though such differing installations will necessarily impose significantly different costs on the County.¹⁷ And the County applies an annual fee adjustment without justifying why the adjustment reflects actual changes to its costs.

¹⁵ Verizon Petition at 14.

¹⁶ Verizon Petition at 25 (asserting that the County failed to provide any information regarding its costs of administering its public rights-of-way and it is therefore not possible to conclude that any of the recurring fees are a reasonable approximation of the County’s actual relevant costs or that they are themselves objectively reasonable).

¹⁷ Verizon Petition at 25–26.

Third, Clark County's fees are inherently discriminatory because similarly situated carriers may pay different fees for sitings that generate exactly the same costs. For example, the gross revenue-based fee is based on provider gross revenues rather than costs imposed on the County to manage or maintain the rights of way, which means providers will pay different fees for the exact same costs.¹⁸

For all these reasons, the County's recurring fees materially inhibit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment, and therefore effectively prohibit the provision of telecommunications services.

In addition, the fees exceed the presumptively reasonable annual rate of \$270 set forth in the *Small Cell Declaratory Ruling*.¹⁹ The Commission was clear that "there should be *only very limited circumstances* in which localities can charge higher fees consistent with the requirements of Section 253."²⁰ Here, Clark County has not presented any special circumstance that would justify recurring fees in excess of the presumptively reasonable rate. Accordingly, the Commission should declare that the recurring fees violate Section 253 and the *Small Cell Declaratory Ruling* and are preempted.

CONCLUSION

The excessive fees charged by Clark County present exactly the type of situation that the Commission intended to address in the *Small Cell Declaratory Ruling*. The Commission should

¹⁸ *Id.*

¹⁹ Verizon Petition at 11–12. Verizon sets forth the various recurring fees that wireless providers must pay to deploy small wireless facilities in a Clark County rights of way. First, carriers must pay an annual wireless site license fee that ranges from \$700 to \$3960 per year and is subject to an automatic annual increase of two percent. Second, wireless carriers must pay recurring gross-revenues use fees of five percent of gross revenues collected by the provider. *Id.* See also Clark County Code, Title 5, Chapter 5.02, *et. seq.*

²⁰ *Small Cell Declaratory Ruling* at 33 FCC Rcd at 9130 ¶ 80 (emphasis added).

apply the standards set forth in the *Small Cell Declaratory Ruling* and remove the barriers to deployment in Clark County by preempting Clark County's unlawful recurring fees for small wireless deployments. In doing so, the Commission will also set a useful precedent for other localities and will help the nation move forward in meeting its 5G goals.

Respectfully submitted,

/s/

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